IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Appellant,

Case No.: SC03 - 330
Lower Tribunal Case No.: 5 D02 - 503

v.

JAMES OTTE

Appellee.

_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE OTTE

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TABLE OF AUTHORITIES

Cases:

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STATEMENT OF THE CASE AND FACTS

The Appellee accepts as substantially accurate the Appellant's statement of the case and facts except for page 2 lines 11 - 17 " Assuming this four month time period is customary traffic for the escort business, and assuming that only one half of these incoming calls were to arrange prostitution services, the resulting average is more than ten customers per day. At the rate of $150 per customer, the gross annual income is in excess of $500,000 a year, with half of that amount going directly to Appellee and his wife." Appellee objects to the State's assumptions because they are speculative, lack a foundation or predicate and are not supported by the record.

The one hundred thirty (130) page Application And Affidavit For An Order

Authorizing The Interception Of Wire Oral And Electronic Communications filed on December 15, 2000 has the following very limited information about JAMES OTTE.

> " JAMES OTTE, also known as James Adrian Otte, is a 49 year old white male, date of birth May 2, 1951, social security number 057 - 44- 9603. Based upon your Affiant's investigation, surveillance, public records and investigative subpoenas your Affiant knows the following: Otte lives with his spouse, Diane Fratello (Paragraph 16), at 1346 Providence Boulevard in Deltona, Volusia County, Florida. Otte has two adult children from a prior marriage that live elsewhere. Otte has no identifiable criminal history. Your Affiant obtained by subpoena information from the State of Florida, Department of Labor and Unemployment Security, Bureau of Tax, regarding any employment for James Otte from April 1, 1999, through April 1, 2000 (Exhibit 108). Otte was employed by the County of Volusia from 1998 through the second quarter of 1999. During the last two quarters of 1999 James Otte was employed by the State of Florida Department of Corrections in Marianna, Florida, and in Gainesville, Florida. As of June 21, 2000, James Otte is still a state correctional officer, but is now stationed at the Tomoka Correctional Institute in Daytona Beach. There is no Volusia County Occupational license or application on file for James Otte. Florida Department of Highway Safety and Motor Vehicle records reflect that James Otte owns a 1997 Ford F 150 pick up truck with Florida license GS880S, a 1984 Yamaha Motorcycle with Florida license 25397V and a 1997 Ford Ranger pick up truck with Florida license WPY38G." (R 277, 278) . . . (R 357) " James Otte (paragraph 17) was observed in and out of the house in their front lawn several times. . . .
> . . . 150 " Your Affiant has obtained banking records, through subpoena for James Otte (paragraph 17) . . . (R 363) 151 Based upon available public records and subpoenaed financial records from institutions identified through this investigation a basic net worth analysis has been conducted for Diane Fratello (paragraph 16) and her spouse James Otte (paragraph 17) Exhibit 153. The information, in your affiant's judgment, is far from complete, but further information is only likely to be obtained by search warrant for

> documents at the home of Diane Fratello (paragraph 16) and James Otte (paragraph 17) or through subpoena to local, (in town) institutions which could compromise this investigation because of the unknown level of intimacy with Fratello and Otte. . . . For the year 1999 Diane Fratello (paragraph 16) and James Otte (paragraph 17) jointly had assets estimated at $131,343.00 and liabilities estimated at $39,966.00 and a net worth of $91,377.00. ”(R 364)

Those are the only instances in which Otte is mentioned by the affiant Greg Arthur in his application. Otte had obviously little or no connection to the alleged non-violent criminal activities which were the subject matter of the wiretap.

The other 128 pages of the affidavit detailed the actions of co-defendant Diane Fratello and her escort service, Elegant Encounters and PartyGals, the escort service run by Cheryl England. Otte is barely mentioned. There is no mention of any criminal wrongdoing by Otte in the application. The Affidavit and Order authorizing the wiretap fail to allege any prostitution related violence or threat of violence or any crimes that are dangerous to life, limb or property. The extensive record put together by the State gives no indication of any substantial criminal enterprise dangerous to life, limb or property. Although the affidavit specifically alleged that cocaine and other controlled substances were provided to customers upon request, there was no finding of the existence of any dangerous drugs in the Order approving application. Ultimately, no cocaine or other controlled substances were ever found by law enforcement to have been provided to customers upon

request and no drug charges were ever filed. The application made no connection between Fratello and others in the alleged enterprise and James Otte. The connection between Fratello and Otte in the application is very limited identifying him as the Husband. The application fails to allege any other incriminating facts about Otte. There is no relationship established between co-defendant Diane Fratello a/k/a Diane Otte and Cheryl England. There was no basis for the Order authorizing the intercept of James Otte's communications. There was no sufficient allegation of Otte's criminal wrongdoing nor any violence nor threat of violence in the application or in the return to justify the Order. The facts presented in the application and the affidavit were insufficient to justify the intercept regarding Otte.

SUMMARY OF ARGUMENT

This court does not have appellate jurisdiction in this case. The appellee objects to jurisdiction and moves to dismiss for lack of jurisdiction. The appellee has previously filed a Motion To Object To Jurisdiction And Motion To Dismiss For Lack Of Jurisdiction. The district court's decision did not declare invalid the portion of the wiretap statute. Fla. Stat. 934.07 (Fla. Stat. 1999). The district court agreed with the trial court ruling that the interception of communications based on racketeering offenses with predicates of non-violent prostitution related acts contravenes federal law. The District Court concluded that the trial court properly determined that the wiretap intercepts were unauthorized under Federal or State Law and affirmed. The district court's ruling is presumptively correct. The district court ruled as a matter of law. After conducting an evidentiary hearing the trial

court ruled that the police lacked legal authority to obtain a warrant since the charges were all centered around alleged prostitution activities. The district court's ruling should be affirmed because it correctly applies the controlling law as set forth in State vs. Rivers, 660 So. 2nd 1360 (Fla. 1995). The state's application and the wiretap order itself failed to allege any violence or threat of violence nor danger to life, limb or property for these prostitution related offenses.

POINT ON APPEAL

ISSUE ONE - OBJECT TO JURISDICTION

This court does not have appellate jurisdiction in this case. Appellee objects to jurisdiction and moves to dismiss for lack of jurisdiction. Appellee incorporates by reference his Motion to Object To Jurisdiction And Motion To Dismiss For Lack Of Jurisdiction. The district court's decision did not declare invalid Florida Statute 934.07 (1999). In the Federal wiretap statute, Congress specifically preempted the field of interception of wire communications under its power to regulate interstate communications, yet at the same time authorized the individual states to adopt their own wiretap statute so long as they were not less restrictive than the federal legislation. The finding that Section 934.07 of the Florida Statutes

to a limited extent contravenes the requirements of title 18 USC Section 2516 (2) does not declare unconstitutional the Florida wiretap statute.

Neither the trial court nor the District Court ruled Fla. Stat. 934.07 (1999) invalid. " Courts may preserve the constitutionality of an act by eliminating an invalid portion under the severability rule." State vs. Rivers, 643 So. 2nd 3 (Fla. 5th DCA 1994)

This court has also held that Florida's wiretap statute must be strictly construed and narrowly limited in its application by the specific provisions set out by the legislature. In Re Grand Jury Investigation 287 So. 2nd 483 (Fla. 1972)

Neither the trial court nor the Fifth District Court of Appeal entered an order or a decision declaring invalid a state statute or a state provision of the constitution.

The district court determined that one part of the statute was an invalid exercise of the authority delegated from Congress and was pre-empted by Congress.

This court should deny jurisdiction and remand to the trial court.

POINT ON APPEAL

ISSUE TWO

FLORIDA'S WIRETAPPING STATUTE § 934.07, Fla. Stat. (1999) DOES NOT AUTHORIZE WIRETAPS TO INVESTIGATE NON VIOLENT PROSTITUTION RELATED OFFENSES WITHOUT CONTRAVENING THE REQUIREMENTS OF 18 U.S.C. § 2516 (2).

The District Court did not find § 934.07 Fla. Stat. (1999) unconstitutional. The Trial Court and District Court looked at the plain meaning of § 934.07 Fla. Stat. (1999) and construed it consistent with controlling Federal Statute 18 U.S.C. § 2516 (2) as construed by the Florida Supreme Court in State vs. Rivers, 660 So. 2d 1360 (Fla. 1995) . The District Court opinion is correct and should be affirmed.

Regarding the standard of review the appellant relies on Stephens vs. State , 748 So. 2d 1028 (Fla. 1999). Stephens was a case alleging ineffective assistance of counsel under Fla. R. Crim. P. 3.850. The issue in Stephens was what is the standard of appellate review for ineffective assistance of counsel claims. The ruling in Stephens was that an alleged ineffective assistance of counsel claim was a mixed question of law and fact subject to the plenary review based on Strickland vs. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80, L. Ed. 2d 674 (1984). The claim and procedural status of Stephens are much different than the instant case and is distinguished from the instant case.

The Appellant relies on State vs. Slaughter, 574 So. 2d 218 (Fla. 1st DCA 1991) for the proposition that the District Court's opinion is presumed to be incorrect. Slaughter was charged with unlawfully threatening unlawful harm to a public servant - a Circuit Judge. Slaughter moved to dismiss the information. The Circuit Court dismissed the information on the grounds that the Statute creating the offense was unconstitutional. The State appealed. The District Court of Appeal reversed and found the Statute constitutional. In the instant case the District Court did not make any express findings that § 934.07 Fla. Stat. (1999) was unconstitutional, unlike the Slaughter case. Slaughter says : " At the outset, an exception to the rule that a trial court's judgment is presumptively valid occurs

when an appellate court is called upon to pass upon a statute which the trial court has declared unconstitutional. " Slaughter does not state that the lower courts orders are presumed to be incorrect.

The District court properly relied on this Court's ruling in State vs. Rivers, 660 So. 2d 1360 (Fla. 1995). Rivers is on point and is controlling precedent. The Appellant finds fault in the lower courts for failing to recognize that organized crime is dangerous whether prostitution related offenses are all or part of the object of the criminal organization (Initial brief page 8). But the Application and Affidavit failed to allege anywhere that the crimes subject to the wiretap were "dangerous to life, limb, or property or that violence or a threat of violence had occurred". Law enforcement below could have obtained a wiretap authorization in conformance with the Federal Statute if the application alleged violence or threats of violence in connection with prostitution-related offenses. No violence was ever alleged.

The District Court quoted State v. Rivers, 660 So. 2d 1360 (Fla 1995) as the controlling precedent and said: "To the extent that [section] 934.07 [of the Florida Statutes] permits the authorization of wiretaps to investigate prostitution not involving the use of force or any danger to life, limb, or property, or interstate commerce, it contravenes the requirements of Title 18 U.S.C. Section 2516(2).

While Florida's counterpart is quite similar to the federal statute it enumerates a more expansive list of offenses where wiretaps are authorized, including prostitution. § 934.07, Fla. Stat. (1991). Thus, the district court correctly

identified the key issue as whether prostitution falls within the 'dangerous to life' general category of the federal statute.

Courts in several other jurisdictions have concluded that prostitution is not a crime dangerous to life, limb, or property under the federal wiretap statute. *See* *People v. Shapiro*, 50 N.Y., 2d 747,431 N.Y.S. 2d 422, 409 N.E. 2d 897 (1980); *United States v. Millstone Enters., Inc.*,684 F. Supp. 867, 870 (W.D. Pa.), *rev'd on other grounds,* 864 F.2d21 (3d Cir. 1988); *but see* Commonwealth v. Birdseye, 432 Pa. Super. 167,637 A. 2d 1036, 1040 - 41 (finding that prostitution is dangerous to life based upon the threat of AIDS), *review granted,* 538 Pa. 664, 649 A. 2d 667 (1994).

"The State argues that prostitution is dangerous to life because the virus that causes AIDS is sexually transmitted. Thus, the State contends, prostitution-related felonies such as deriving support from the proceeds of prostitution meet both prongs of the general category: dangerous to life and punishable by imprisonment for more than one year. ***1363** Unquestionably, the spread of the virus that causes AIDS is a great health concern. However, this alone does not make prostitution intrinsically dangerous to life. Moreover, Congress specifically provided that the dangerous to life general category, is intended to exclude such offenses as fornication and adultery, which do not involve danger to life, limb, or property.

While we find that prostitution in general is not 'dangerous to life,' we agree with the *Millstone* and *Shapiro* courts that wiretaps could be authorized in conformance with the federal statute where the allegations of prostitution-related offenses involve violence or the threat of violence. *See* *Millstone*, 684 F. Supp. at 870 - 71; *Shapiro*, 431 N.Y.S. 2d at 431 - 33, 409 N.E. 2d at 907 - 08. However, under the circumstances of this case, section 934.07 cannot be read as authorizing wiretaps to investigate non-violent prostitution-related offenses without contravening the requirements of 18 U.S.C. § 2516 (2). Thus, we agree with the district court that the trial court properly suppressed the evidence obtained from the wiretaps in this case." State v. Otte 28 Fla. L. Weekly D 134 (Dec. 27, 2002).

Congress preempted the authority of the State of Florida to include the crime of prostitution in its wiretap statute. "While states may enact more stringent standards regarding the use of wiretaps within its borders, states may not allow

wiretapping which exceeds the boundaries of the federal statute." . . . "The test is the sufficiency of the allegations contained in the request for the wiretap authorization, not the evidence of other crimes discovered as a result of the intercept of the communication." State vs. Rivers 660 So. 2d 1360 (Fla. 1995)

The application never alleges that Otte was involved in any crimes dangerous to life, limb or property . The procedural status of the instant case is identical to the status in Rivers wherein the state appealed from the trial court's order granting appellee's motion to suppress evidence obtained through an authorized wiretap. In Rivers the request for the wiretap order was not based on RICO. " This matter arose out of the investigation conducted by Agent McCue . . . . who was investigating an alleged prostitution ring operating in Orlando . . . McCue believed that he could not obtain the evidence necessary to prosecute these individuals without use of a wiretap surveillance. As such pursuant to § 934.09 (1a) of the Florida Statutes, McCue filed an affidavit and application for an order authorizing the interception of wire, oral and electronic communications. . . . . As a result of the intercepted communications, the state charged violations of RICO, . . . prostitution . . . and deriving support from the proceeds of prostitution." State v. Rivers 643 So. 2d 3 (5th DCA 1994)

In Rivers this court compared and reviewed the applicable State and Federal

statutory provisions related to the interception of communications, to wit: § 934.07 Fla. Stat. (1999) and 18 U.S.C. § 2516.

The trial court did not rule the Florida Statute invalid. Higher courts had already done so; " . . . Finding that courts may preserve the constitutionality of an act by eliminating an invalid portion under the severability rule." Rivers 5th DCA at 3.

Although in the instant case Racketeering (RICO) and money laundering were alleged at the outset when the trial judge issued a wiretap order specifically finding probable cause to believe that RICO and illegal financial offenses were occurring, the trial court never issued an order nor a finding that there was probable cause to believe that defendants were committing crimes dangerous to life, limb, or property for which the Federal Wiretap Statute authorizes wiretaps. 18 U.S.C. § 2516 (2).

The lower courts did not err in relying on Rivers to invalidate the wiretap in this case. The facts in Rivers are almost identical. The only difference is that RICO was not alleged in Rivers application. The lower courts addressed that issue.

" The Rivers court did not reach the issue of whether RICO violations based on prostitution offenses would validly authorize a wiretap under the federal statute

because the RICO charges in its case did not materialize until after the State obtained evidence through intercepting communications. Id at 1361 However, the Rivers court relied on the Millstone reasoning for support in its finding that prostitution was not a 'dangerous' offense. Id at 1362 - 1363 " (Volume R 2045)

The trial court below addressed the legislative intent The Order states: (R 2045 - 2046) The State also asserts that the Florida Supreme Court in Rivers did not apparently consider the congressional intent. That is not the case. The Rivers court specifically agreed with the Shapiro and Millstone courts interpretation of the same statements in the legislative history, and the Rivers court also cited to the same pages of legislative history. Rivers 660 So. 2d 1362 - 1363. . . In conclusion, this Court finds the Rivers holding and its reliance on Millstone and Shapiro persuasive regarding the interpretation of 18 U.S.C. § 2516 (2) and the congressional intent behind the application of the federal statute to state prosecutors in racketeering cases predicated on acts of prostitution (R 2047). . . . The Federal wiretap statute authorizes the Federal Prosecutor to apply for a wiretap based on racketeering regardless of the underlying predicate acts. . . . However, the federal statute does not authorize the state prosecutor to do the same. Compare 18 U.S.C. § 2516 (1) (2001) with 18 U.S.C. § 2516 (2) (2001)" (R 2048). The trial court added: "Congress has preempted the field of interception of wire

communications. Thus, this court must be careful not to allow contravention of the requirements of 18 U.S.C. § 2516 (2), through the use of § 934.07 Florida Statutes (1999). See ID at 1363. As such, this Court finds that the interception of communications based on racketeering offenses with predicates of non-violent prostitution- related acts contravenes 18 U.S.C. § 2516 (2)." (R 2047 - 2048) The trial court addressed the Federal versus State prosecutor distinction. " Therefore, this court also finds that an alleged money laundering violation, where non-violent prostitution related offenses are the sources of the money laundering, may not be permitted to bootstrap prostitution-related conduct into the category of crimes dangerous to life, limb or property in order to authorize the wiretap. See Millstone , 684 F. SUPP at 871; Rivers 660 So 2d at 1363." (R 2048) The lower courts orders are well reasoned and are based on the clear and plain meaning of the controlling precedents.

The Appellant relies on Gross v. State, 765 So. 2d 39 (Fla. 2000) for the proposition that all RICO charges by implied definition create a danger to life, limb or property. The Gross case involved counts of RICO, burglaries and robberies with guns in home invasions. The issue in Gross was the definition of the enterprise element in the Florida RICO Statute. In Gross this court adopted a broad view of the definition of enterprise. " FN 5 Nevertheless, our adoption of

the broad view should not be taken to signify that the RICO statute can be used to supplant or expand the breadth of the conspiracy statute or prosecutions under that statute. Nor does it permit the prosecution of any garden variety criminal undertakings. Indeed, as this Court has previously stated: By requiring a continuity of criminal activity as well as a similarity and interrelatedness between these activities, the target of RICO Act prosecutions will be, appropriately, the professional or career criminal and not non-racketeers who have committed relatively minor crimes. Bowden v. State, 402 So. 2d 1173, 1174 (Fla. 1981) We adhere to the view that while the State's ability to prove the enterprise element should not be hindered by having to prove an ascertainable structure, the State should equally not be able to routinely invoke the RICO statute for prosecuting any ordinary set of crimes." That is exactly what the Statewide Prosecutor has done in this case. He has routinely invoked the RICO statute with wiretap to prosecute the ordinary garden variety crime of prostitution occurring within one (1) county only.

While the Appellant asserts that all RICO charges by definition create a danger to life, limb, and property, no violence or threat of violence was alleged in the application and affidavit nor found in the order authorizing.

The case of Berjerano vs. State, 760 So. 2d 218(Fla. 5th DCA 2000), like

Gross, was just concerned with the definition of enterprise and illegal prostitution in the RICO operation. Berjerano is not on point with the instant case. It was an insurance fraud case. No prostitution was charged and no wiretaps were sought nor obtained.

The Appellant cites Vaughn vs. State, 711 So. 2d 64 (Fla. 1st DCA 1998) for the proposition that successful racketeering prosecutions can be based on criminal enterprises involving prostitution. In Vaughn the Defendant pled guilty and there was no trial. Vaughn is not on point. The issue in Vaughn was whether the trial court's ruling on the motion to suppress was dispositive or not. The trial court in Vaughn applied the incorrect legal rule on dispositiveness and the 1st DCA corrected it and supplied the correct legal rule. In the instant case the lower courts applied the correct legal rule.

Golden vs. State, 578 So. 2d 480 (2nd DCA 1991) does not have any precedential value and is not on point. In Golden there is no mention of wiretaps and no motion to suppress was filed by the Defendant. It is unclear from the opinion whether or not the Defendant raised the issue which has been raised in the instant case.

Cantrell vs. State, 403 So. 2d 977 (Fla. 1981) is not precedent to this case. In Cantrell the Defendant pled nolo contendere. The Defendant in Cantrell made

no challenge to the wiretaps on prostitution grounds. The issue in Cantrell is not the same as the one before this court.

In Carroll vs. State, 459 So. 2d 368 (Fla. 5th DCA 1984) Defendant was charged with RICO, sale and delivery of cocaine and heroin. Carroll was not charged with prostitution. The court in Carroll is only concerned with whether or not the trial court could adjudicate and sentence Carroll for the RICO and predicate offenses. No issue of wiretaps or motion to suppress was raised in Carroll. Carroll is not on point.

The order approving application and affidavit never made the critical finding of any danger to life, limb or property or violence or threat of violence. There is no connection between the activities of co-defendant Fratello and the other individuals allegedly engaged in the prostitution offenses and JAMES OTTE. There is no connection between the intercept and JAMES OTTE.

The lower courts made correct rulings that properly interpreted State vs. Rivers.

CONCLUSION

The District court opinion approving the trial court's order suppressing the wiretap evidence should be affirmed based on State vs. Rivers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Belle B. Schumann, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida, 32118 - 3951 this ___ day of April, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14 - point Times New Roman, in compliance with Fla. R. App. P. 9.210 (a) (2).

Respectfully submitted,

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